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No. _____

In The
SUPREME COURT OF THE UNITED STATES

FRANCISCO JAVIER RIVERA AGREDANO and
ALFONSO CALDERON LEON,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI to the U.S. Court of Appeals for the Federal Circuit

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law when utilizing a finding of "incongruous" (as opposed to the well established standard of "clearly erroneous") when reviewing the factual findings of the trial court and overturning several prior published decisions by the Court of Federal Claims [AGREDANO v USA; 82 Fed.Cl. 416 (2008); AGREDANO v USA 70 Fed.Cl . 564 (2006) and the similar case of Rodriguez v USA 69 Fed.Cl. 487 (2006)]. The judgment awarded in favor of Francisco Rivera Agredano in the amount of $550,854.00 was vacated on a finding by the Court of Appeals that the Trial Court's factual determination were "incongruous". The judgment represented the economic damages AGREDANO incurred after spending almost a year in a Mexican prison after purchasing a vehicle from the USA in a commercial transaction at a federal forfeiture sale and thereafter being arrested because the vehicle still contained over 37 pounds of concealed marijuana at the time of the sale by the USA to AGREDANO.

2. Whether the United States Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to transfer to the Ninth Circuit Court of Appeal the issues on appeal related to the dismissal of the petitioners' Federal Tort Claims Act ["FTCA"] causes of action by the Southern District of California. The petitioners' FTCA causes of action were dismissed and the matter transferred to the Court of Federal Claims on a breach of warranty theory after the Supreme Court issued a ruling in the case of Sosa v.

Alvarez-Machain 542 U.S. 692 (2004) finding that 28 U.S.C. 2680(k) barred any claim under the FTCA when the injury was suffered in a foreign country (eliminating the "headquarters doctrine").

3. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law and decided an important question of federal law in a way that conflicts with relevant decisions of this Court when holding, in effect, that the existence of a regulatory duty that is similar to a duty also implied in a contract with the USA will result in immunity for the USA for any breaches of the implied duty in the commercial transaction. [see; ruling as cited in case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010)]

4. Whether the United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court when upholding the trial court's dismissal of the claims of petitioner ALFONSO CALDERON LEON as a third party beneficiary of the commercial contract and implied warranties between the USA and AGREDANO.

5. Whether the trial court improperly stated the rule of law in a published opinion when refusing to award non-economic damages on the contention that plaintiff did not provide evidence of "reasonable compensation" for his emotional distress and did not establish the right to a specific award of monetary compensation for emotional distress injuries.

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The published decision of the Court of Appeals for the Federal Circuit [595 F3d 1278 (Fed. Cir. 2010)] reversed the published opinion of the Court of Federal Claims granting judgment in the amount of $550,854 in favor of Francisco Javier Rivera Agredano [hereinafter AGREDANO][see; AGREDANO v USA; 82 Fed.Cl. 416 (2008)] and overturned earlier published opinions by the Court of Federal Claims in the instant case [AGREDANO v USA 70 Fed.Cl . 564 (2006)] and the similar case of Rodriguez v USA 69 Fed.Cl. 487 (2006).

JURISDICTION

The JUDGMENT of the Court of Appeals for the Federal Circuit was entered on February 17, 2010. A request for rehearing and rehearing en banc was timely filed and denied in a decision issued April 16, 2010. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) and 28 U.S.C. 2680(k)

"... the district courts .... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property or personal injury .... caused by the negligent or wrongful act or omission of any employee of

the Government while acting within the scope of his office or employments, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." [28 U.S.C. 1346(b)]

"The provisions of this chapter and section 1346 (b) of this title shall not apply to – (k) Any claim arising in a foreign country." [28 U.S.C. 2680(k)]

STATEMENT OF THE CASE

AGREDANO purchased a Nissan Pathfinder from the USA at a federal forfeiture sale in San Ysidro, CA (a border city with Tijuana, Mexico) in September of 2001. In January of 2002, AGREDANO and Alfonso Calderon Leon [hereinafter CALDERON] were arrested near Ensenada, Mexico when the Mexican Federales discovered over 37 pounds of marijuana concealed in the wheel wells and underneath the back seat.

AGREDANO and CALDERON spent nearly a year in prison in Ensenada before establishing that the narcotics had been in the Pathfinder at the time that it was bought from the USA. Photographs eventually obtained from the USA (taken by the USA at the time of the seizure in January of 2001), revealed that the Nissan Pathfinder had been seized because of marijuana concealed in the gas tank but that the back seat and wheel wells (where the 37 pounds of marijuana was discovered when AGREDANO and CALDERON were arrested) had not been

searched by the USA prior to the auction sale in September of 2001.

The USA had written procedures in effect for the post forfeiture auctions requiring that the USA remove any narcotics in the vehicles before the vehicles were offered for sale. [AGREDANO, supra, at 438-439] The trial court found that these policies were enacted for the purpose of conducting the sale of property forfeited and owned (at the time of the sale) by the USA. [Id., at 438-440] There is no evidence cited by the Court of Appeals supporting the factual conclusion reached by the Court of Appeals that the written policies at issue were part of the regulatory functions of the USA or that the trial court's factual determination to the contrary was "clearly erroneous".

The USA acknowledged in sworn testimony that the consumer would not be able to detect the concealed narcotics on their own and also that there was a "laxness in procedures" (per sworn testimony of former Assistant Commissioner Jayson Ahern) at the San Ysidro border crossing at the time that the Nissan Pathfinder had been initially seized in January of 2001. [AGREDANO, Id., at 445]

A complaint was filed under the FTCA in the Southern District of California on November 14, 2002. In June of 2004, the United States Supreme Court issued the ruling in Sosa v. Alvarez-Machain 542 U.S. 692 (2004) finding that 28 U.S.C. 2680(k) barred any claim under the FTCA when the injury was suffered in a foreign country. On November 2, 2004, the

Southern District of California granted USA's motion for summary judgment as to the FTCA cause of action finding that the FTCA cause of action was barred under the decision in Sosa v. Alvarez-Machain, Id. because AGREDANO and CALDERON were arrested in Mexico.

The Southern District granted AGREDANO and CALDERON's request for leave to amend to state causes of action under the Tucker Act. The parties then stipulated to transfer the contract and implied warranty causes of action to the Federal Court of Claims where it was assigned to the Hon. Emily C. Hewitt. [Southern District Case Number 02CV2243; Docket entry filed February 3, 2005]

On March 28, 2006, the Federal Court of Claims dismissed the claim of CALDERON in a published decision finding that the evidence did not support a finding that he was an intended third party beneficiary of the sales contract between the USA and AGREDANO. [AGREDANO v USA 70 Fed.Cl . 564 (2006)] On May 3, 2007, in a published decision, the Hon. Emily C. Hewitt denied the request of CALDERON for reconsideration of the dismissal of his third party beneficiary claim.

A four (4) day trial was held on the remaining claims of AGREDANO in January, 2008. On June 27, 2008 the Honorable Emily C. Hewitt entered JUDGMENT in favor of AGREDANO on the cause of action for breach of the implied warranty and awarded special damages in the amount of

$550,854.00. No amount was awarded for general ("serious emotional disturbance") damages. [AGREDANO, Id., 82 Fed.Cl. 416 at 451-452 (2008)]

On July 2, 2008, AGREDANO filed a motion for reconsideration of the denial of reasonable compensation his "serious emotional disturbance". The motion was denied in a published opinion on July 22, 2008.

The Court of Appeals reversed the trial court judgment (and overturned several published opinions by the Court of Federal Claims) finding as follows: "Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed." [AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)].

This factual finding by the Court of Appeal is contrary to the findings of both trial court judges who have interpreted the scope of the "as is" provision in relation to the implied-in-fact warranty at issue in this case. [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008) and Rodriguez v USA 69 Fed.Cl. 487, 498 (2006)] and is furthermore based on an incorrect legal standard of "incongruous".

This ruling by the Court of Appeals is particularly unfair because: (1) as the Court of Appeals referenced during oral argument, both of the parties to the commercial transaction (i.e., AGREDANO and the USA) believed that the vehicle had

been reasonably searched and that large loads of contraband removed before the sale; (2) the search at issue was for the purposes of the commercial sale transaction and NOT to fulfill any regulatory duty owed by the USA; (3) the USA conceded that the consumers would not be able to discover the concealed marijuana on their own nor was any specific warning or disclaimer provided of the need to have the Pathfinder further examined for potentially remaining concealed narcotics; and, (4) the USA conceded that there was a "laxness in procedures" in regard to vehicle searches by the USA at the time of the sale and that if the Pathfinder had been adequately searched, **as required by written policies for the commercial transaction**, before it was sold, the 37+ pounds involved in this case would have been discovered and removed. [AGREDANO, Id., at 444]

REASONS FOR GRANTING THE PETITION

1. The United States Court of Appeals for the Federal Circuit decided an important question of federal law that has not been, but should be, settled by this Court when the Court of Appeals overturned several published lower court decisions and vacated a judgment awarded in favor of AGREDANO in the amount of $550,854.

The decision rendered by the United States Court of Appeals for the Federal Circuit has the potential to unfairly and adversely impact many members of the general public. The ruling furthermore will have an unreasonably disparate impact on individuals (including US citizens) who purchase a vehicle

from the USA and then drive over the border into Mexico before being wrongfully arrested for large loads of marijuana negligently left in the vehicle by the USA at the time of the sale. In fact, this disparate impact has already occurred as another party (also a citizen of Mexico) suffering this exact same harm (imprisonment because of narcotics left in a forfeited vehicle sold at an USA auction) was allowed to proceed with his negligence lawsuit because his arrest occurred in San Ysdiro, CA and not in Mexico [see; Cervantes v United States 330 F 3d 1186 (9th Cir. 2003)].

The published decision by the Court of Appeals in this case has already been cited in another published decision, the case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010) for a proposition that it does not particularly support. The Agredano, supra, 595 F3d 1278, 1280-1282 (Fed. Cir. 2010) case is cited in the Precision Pine, supra at 830 case for the general proposition that if the USA violates its statutory duties to an unrelated third party, a contracting party cannot rely on these violations to establish a contractual violation to a party to whom the statutory duties were not owed.

This holding has little to do with the facts or proper statement of the law involved in the Agredano v USA case as the duty owed in this case is an implied term of the contract and not an extension of the USA's regulatory obligations in general. The improper citation of the Agredano supra, 595 F3d 1278 holding in the Precision Pine 596 F3d 817, 830 case further illustrates the need for review and consistency to avoid further

misapplications of the rule of law as a result of the published decision at AGREDANO v USA, 595 F3d 1278.

This ruling will not only put innocent people at risk but also opens the door to corruption. This ruling perpetuates of the attitude expressed by Border Patrol Officer Joseph Mariloa when he testified that the Border Patrol officers were told at daily briefings to "minimize damage" during searches of seized vehicles for "resale" purposes. [Id., at 441]. Under this ruling, the USA has no obligation to specifically warn the individuals it solicits for these commercial transactions of the risk of imprisonment arising from "laxness in procedures" by the USA in regard to searches of vehicles sold at auction nor does the USA have any obligation to assist the consumer later should they be wrongfully arrested as a direct result.

The judgment of the Court of Appeals misapprehended the facts of this case by disregarding the trial court's conclusion that the implied-in-fact warranty was "founded upon a meeting of minds, which, although not embodied in an express contract, (was) inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." [AGREDANO v USA, 82 Fed.Cl. 416, 440 (2008); citing, Baltimore & Ohio R.R. 261 U.S. 592 at 597 (1923)]

The ruling of the Court of Appeals misapprehended the facts of this case by finding that the mere existence of the generic "as is" provision in a sale catalog formed the "tacit

understanding" of the parties and that, as a result, the USA was not required to conduct a thorough search of the forfeited vehicle (in this case seized for the transportation of narcotics in the gas tank) to remove the rest of the concealed narcotics [narcotics which the Trial Court found that the USA had probable cause to suspect were still present; see, AGREDANO, 82 Fed.Cl. 416, 431, 433 (2008)] before selling the vehicle to the general public in an auction.

The Court of Appeals decision overlooked the principle of law (particularly in light of the fact that the USA did not brief or argue this basis for reversal on appeal) that the trial court's factual conclusions must be "clearly erroneous" [Anderson v City of Bessemer City, 470 U.S. 564 (1985)] before being overturned on appeal.

A review is warranted in light of the fact that there is such a disparity in opinion regarding the true scope of the "as is" provision; i.e., not only is there a contradiction between the two trial court Judges and the Court of Appeal, even the Court of Appeal's opinion involved a concurring opinion by Circuit Judge Dyk and an Errata issued February 24, 2010 (as to the source of the purported publication of the "as is" provision to the consumer). This shows that the question is by no means a clear and unequivocal question and is instead one on which learned minds have already demonstrated division.

This case may be one of the first cases to examine whether or not the abolishment of the "headquarters defense"

by the US Supreme Court ruling in Sosa v Alvarez (2004) 542 US 692 case should result in recovery in the Court of Claims under implied warranties. This case would not even be in the Court of Claims or before the Court of Appeals for the Federal Circuit but for the abolishment of the FTCA cause of action as a result of the the Sosa v Alvarez (2004) 542 US 692 decision in June of 2004.

The rationale for the decision in the Sosa v Alvarez (2004) 542 US 692 case (a tort case wherein agents for the USA plotted in the USA to kidnap a criminal suspect in Mexico and fly him to El Paso, Texas for arrest) does not apply under the facts of this case (a commercial transaction entirely performed in the USA) and the application of the Sosa, Id., holding to the facts of the present case ultimately resulted in the harsh and unfair result issued by the Court of Appeals for the Federal Circuit (a decision issued after the Court of Appeals improperly re-weighed the facts on appeal and rejected the facts that the Court of Appeals, on what appears to be a cursory review of the record, found "incongruous").

As a result of the abolition of the "headquarters doctrine" in Sosa v. Alvarez-Machain 542 U.S. 692 (2004), the parameters of implied warranty in commercial transactions wherein the USA's commercial obligations share some of the same duties as the USA's regulatory functions should be set forth. The extent to which individuals injured by the negligent performance of an implied contractual obligation can look to the Court of Federal Claims for relief under implied warranty

theories following Sosa v Alvarez (2004) 542 US 692 is particularly important in situations like the present case wherein the USA elects to enter into commercial transactions with individuals who may be reasonably anticipated to visit or live in Mexico and negligently exposes them to substantial risk of harm by failing to adequately search forfeited merchandise to remove large loads of contraband before selling merchandise (or even to provide warnings of the risk created by the acknowledged "laxness in procedures" to their contracting partner).

As such, a review is requested of these exceptionally important questions and also of the components of the decision which are contrary to established precedent as this published decision could adversely impact a large number of people.

The decision will [and already has; see Cervantes v United States 330 F 3d 1186 (9th Cir. 2003) and Rodriguez v USA 69 Fed.Cl. 487 (2006)] disparately adversely impact individuals who choose to drive vehicles purchased from the USA, in the USA, into Mexico. This includes US citizens such as Adrian Rodriguez, US citizen and social worker from Chula Vista, CA, who was arrested and placed in jail in Tijuana, Mexico for the same reason (narcotics left by the USA in a vehicle purchased at a USA forfeiture auction) as Jose Cervantes, AGREDANO, and CALDERON.

Of these four gentlemen, only Jose Cervantes (a Mexican citizen arrested at the San Ysidro, California border crossing), was allowed to pursue his claim against the USA.

The sole distinction being the country where the concealed marijuana was detected by the authorities. This is an extremely random, inconsistent and inequitable interpretation of the law as a result of the current state of the application of the Sosa v Alvarez 542 US 692 ruling to these commercial transactions.

This published ruling will also have an disparate impact on litigants should the holding in this published case be utilized in other cases to support the reversal of the trial court's factual findings by a Court of Appeals on a diluted standard of "incongruous" as opposed to the established and accepted standard of "clearly erroneous".

This ruling also opens the door to a re-evaluation of the facts on appeal even in cases where the respondent does not even argue on appeal that the facts as found by the trial court were erroneous – much less "clearly erroneous" – and thereby denying the petitioner the opportunity to brief the issue (an issue raised for the first time in this case in the decision issued by the Court of Appeals).

The opinion of the Court of Appeals is also contrary to the holding in the case of Ryan Stevedoring Co v Pan Atlantic Steamship Corp 350 US 124 (1956) in that in the Ryan, Id., case, one of the contracting parties was forced, by the nature of the transaction itself, to rely upon the other party to perform critical functions relating to the "inescapable elements of the service undertaken" [AGREDANO, 82 Fed Cl. 416 at 440 citing Ryan Stevedoring Co v Pan Atlantic Steamship Corp 350

US 124 at 133] In Ryan, Id., the "inescapable element of the service undertaken" was that the obligation of the stevedore company "necessarily includes" the obligation to ".... not only ... stow the [cargo], but to stow [it] properly and safely" [Id., at 133] because the other party to the contract had absolutely no ability to control or oversee this essential component of the contract.

Likewise, in the instant case, it was conceded by the USA that the purchaser at these federal forfeiture auctions has no ability to detect concealed narcotics on his or her own and must necessarily rely upon the USA to not only deliver possession of the vehicle but to search the vehicle and remove concealed narcotics before the delivery of possession. [AGREDANO, supra, at 436, 445] The contract for sale in this case "necessarily included" the removal of narcotics from the vehicle before the sale by the only contracting party with the ability to detect and remove concealed narcotics – the USA. [Id., at 436, 445].

As such, the ruling by the Court of Appeals finding that the USA had no such obligation is contrary to the factual determination of the trial court judge (which was not found to be "clearly erroneous") as well as the holding in the US Supreme Court case of Ryan Stevedoring v Pan Atlantic Steamship Corp 350 US 124 at 133.

2. The United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court by utilizing an improper statement of the rule of law in a published decision overturning the factual findings of the Trial Court's published decision by utilizing an appellate standard of review of "incongruous" as opposed to the well established standard of "clearly erroneous" when overturning the factual findings of the trial court on appeal.

The Court of Appeals reversed the trial court judgment (and overturned several published opinions by the Court of Federal Claims) finding as follows: "Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed." [AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)]

This factual finding by the Court of Appeal is contrary to the findings of both trial court judges who have interpreted the scope of the "as is" provision in relation to the implied-in-fact warranty at issue in this case. [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008) and Rodriguez v USA 69 Fed.Cl. 487, 498 (2006)].

The factual conclusions referenced above by the Court of Appeals were reached without specific briefing on the issue because the USA did not argue on appeal that the trial court's

factual findings were clearly erroneous: "In our opening brief, we demonstrated that the trial court erred as a matter of law in holding the United States liable to [AGREDANO] under a breach of contract theory." [USA Reply brief, pg. 1] Any theory based on the contention that the trial court's factual findings were "clearly erroneous" should have been deemed waived by the USA as it was not raised in the USA brief on appeal or asserted by the USA during oral argument (despite an invitation by the panel during oral argument to do so).

Further, the opinion utilizes the wrong standard, reversing the trial court because the trial court's factual findings were "incongruous" [[AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)]. "Incongruous" is not the standard that is utilized to evaluate a trial court's factual findings. Under established precedent, the trial court's factual findings must be "clearly erroneous" before the Court of Appeals is authorized to overturn them. [Am. Pelagic Fishing Co v US 379 F.3d 1363, 1371 (Fed Cir. 2004) and Anderson v City of Bessemer City, 470 U.S. 564 (1985)].

At oral argument, the USA emphasized repeatedly that the USA was contending that the appeal was based on an error in law – not a finding that the trial court's factual conclusions were "clearly erroneous". Yet, the Court of Appeal necessarily had to disregard the trial court's factual conclusions when deciding to reverse the trial court's judgment. As held in the case of Anderson v City of Bessemer City, 470 U.S. 564 (1985), if the trial court's factual findings as to the parties

"tactic understandings" were not "clearly erroneous", the judgment should not be reversed on appeal. In Beatty v Chesapeake Center 835 F2d 71, 74 (1987) in a concurring opinion, it was stated as follows: " .... in a court trial, a district court's determination which the appellate court finds uncongenial must, nevertheless, be affirmed as to an issue of fact unless clearly erroneous".

The US Supreme Court held: "If the District court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inference from other facts." [Anderson, Id. at 565, 573-574; citing US v US Gypsum 333 U.S. 364, 394-395 (1948)]

In the instant case, the Honorable Emily C. Hewitt conducted an exhaustive review of the evidence relating to the scope of the "as-is" provision [AGREDANO v USA, 82 Fed.Cl. 416, 422, 435-437 (2008)] and ultimately concluded that: "... the 'as is' clause in the contract does not preclude the existence of a possible implied-in-fact warranty in this case because the "as is" clause does not cover a situation in which the defendant sells the Pathfinder with concealed contraband to plaintiff." [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008)] .... the plain meaning of the 'as-is' clause limits its scope to the construction, maintenance, and mechanical operation of the vehicle and does not cover a situation in which 'the vehicle had

been modified in a way that had no effect on its ability to function for transportation' by 'introduc[ing] an attribute not ordinarily associated with [the vehicle's ability to function for transportation].'" [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008) citing AGREDANO v USA 70 Fed.Cl 564 at 572 (2006) citing Rodriguez v USA 69 Fed.Cl. 487, 498 (2006)]

As discussed in AGREDANO v USA, 82 Fed.Cl. 416, 440 (2008) the scope of the "as is" provision is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." [Id., at 440; citing, Baltimore & Ohio R.R. 261 U.S. 592 at 597 (1923)].

The finding of the trial court as to the scope of the "as is" provision in reference to the implied-in-fact warranty in the instant case is based on an evaluation of the facts by the trial court and should not be overturned on appeal absent a showing that the trial court's conclusion was "clearly erroneous" [Anderson v City of Bessemer City, 470 U.S. 564 (1985)]

3. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law and decided an important question of federal law in a way that conflicts with relevant decisions of this Court when holding, in effect, that the existence of a regulatory duty that is similar to a duty also implied in a contract will result in immunity for the USA for any breaches of the implied duty in the commercial transaction. [see; ruling as cited in case

of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010)]

The published decision by the Court of Appeals in this case has already been cited in another published decision, the case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010). The case is cited for the proposition that if the USA violates its statutory duties to an unrelated third party, a contracting party cannot rely on these violations to establish a contractual violation to a party to whom the statutory duties were not owed. This holding has little to do with the facts or circumstances involved in the AGREDANO v USA case.

The search at issue in this case was specifically for the purposes of the sale – a commercial transaction. There is no regulatory obligation which compelled the USA to enter into a commercial transaction with AGREDANO. No such regulatory duty has been cited in any of voluminous legal briefs filed in this matter thus far. There are, however, numerous written USA directives in evidence wherein the purpose of the pre-auction searches is made undeniably clear – the searches were conducted to make sure that the vehicles were free of concealed contraband at the time of the sale transaction.

The pre-sale, post forfeiture searches are not a regulatory function of the USA but a component of the commercial sale transaction – one that the Hon. Emily Hewitt, as Trial Court judge, found that both of the contracting parties in this case presumed had been performed at the time of the sale. [AGREDANO v USA, 82 Fed.Cl. 416, 440 (2008)]

Therefore, while the USA also had a regulatory duty to conduct a thorough search at the time of seizure (which was ALSO breached in this case), the breach of the regulatory duty to search occurred prior to the implied contractual obligation to conduct a subsequent, post forfeiture and pre-auction, search. After a vehicle is forfeited, it belongs to the USA.

The fact that the pre-auction search was post forfeiture and for the purpose of the sale transaction was documented in the written directives issued by the USA. The goal of the pre-auction search was to ensure that the narcotics were removed for the purpose of the commercial sale transaction. However, the Court of Appeals, not being the trier of fact and conducting what appears to have been a cursory review of the factual record on appeal, was not aware during oral argument that there were separate searches (one for the seizure and a subsequent one for the purpose of the sale) and appeared to have overlooked this distinction again at the time of issuing the judgment which reversed the trial court's findings on this issue.

As a result, the published decision in this case is now being used to define the extent to which a breach of a regulatory duty can support a breach of a contractual duty. This is a gross misapplication of the rule of law to the facts of the Agredano case and further support for the contention that the "clearly erroneous" standard should not be diluted by case law allowing the Court of Appeals to re-weigh and disregard any facts that the Court of Appeals finds "incongruous" [see; AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)].

4. The United States Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to transfer the issues related to the dismissal of the petitioners' Federal Tort Claims Act causes to the Ninth Circuit Court of Appeal for determination in light of the lack of final judgment in the Southern District of California Federal Court

A request was and is made to transfer the appeal of the dismissal of FTCA claims to the Ninth Circuit Court of Appeal for determination. This case is in a unique posture procedurally as the issuance of the Sosa v Alvarez (2004) 542 US 692 ruling occurred after the FTCA case was filed in this case in the Southern District of California. The subsequent transfer of the case to the Court of Federal Claims was done without entry of final judgment by the Southern District on the summary dismissal of the FTCA claims against the USA. The history of this case and the recent refusal of the Court of Appeals for the Federal Circuit to hear the issues related to the dismissal of the FTCA claims have combined to deny AGREDANO and Alfonso Calderon of the right to be fully heard on this matter.

The issues related to the summary dismissal of the FTCA cause of action should be transferred to the Ninth Circuit Court of Appeals for determination. The FTCA issues were not waived (see; stipulation to dismiss without prejudice and order entered February 3, 2005 in Southern District of California case number 02CV2243) and have not yet been conclusively determined in this action. No final judgment from which an appeal could be taken was entered as a result of the dismissal of the FTCA causes of action until the instant appeal was filed (at

which time the issue of the dismissal of the FTCA causes of action was properly raised). [28 U.S.C. Section 1631]. As the Court of Appeals for the Federal Circuit refused to consider this properly raised issue on appeal, a transfer to the Ninth Circuit Court of Appeal is proper and the only equitable manner in which to ensure that the petitioners' rights in this case are fully and fairly considered.

5. Whether the United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court when upholding the trial court's dismissal of the claims of petitioner ALFONSO CALDERON LEON as a third party beneficiary of the commercial contract and implied warranties in the contract between the USA and FRANCISCO RIVERA AGREDANO

The Court previously dismissed the claim of CALDERON in a published decision dated March 28, 2006. In a similar case pending in the United States Court of Federal Claims, Rodriguez v. USA; 69 Fed. Cl. 487 (2006), the Honorable Charles Lettow dismissed a claim by Adrian Rodriguez in a published decision dated January 30, 2007 based upon a similar rationale

The claims of CALDERON were dismissed based, in part, upon a finding that the damage (imprisonment) was not foreseeable by the USA and that there was no evidence of an intent to provide a benefit to these third parties through the

contractual arrangement that was created in connection with the sale of the Pathfinder to AGREDANO.

The published opinion stated in the pertinent part as follows: "The question is whether the contract for sale can be construed as intending to confer a right on Calderon as a passenger of the vehicle. The Court believes that the question whether a passenger in a vehicle should be considered a third party beneficiary is a close one. ... In the case of a sale of an automobile, however, the court cannot say that the main purpose of the sale is to protect or benefit future passengers." [Rivera Agredano v. USA; 70 Fed.Cl. 564, 579]

To be considered an intended third party beneficiary, the contract must reflect the express or implied intention of the parties to benefit the third party. The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby. [Montana v. USA 124 F.3d 1269, 1273 (1997); Klamath Irrigation v. USA 67 Fed. Cl. 504 at 533 (2005)]

The trial testimony of the USA witnesses confirmed that the were for the express benefit of ultimate occupant and also that the risk of imprisonment to **any occupant** of the vehicle (not just the purchaser) was foreseen as a damage that could occur if the searches were not adequately performed prior to the sale. Therefore, this case is unique in that an implied term of the contract was for the express purpose of protecting the entire class of future occupants from wrongful arrest. The USA

specifically foresaw (per the Assistant Director Lawrence Fanning and Assistant Commissioner Jayson Ahern) that the risk of arrest extended to any occupant of the vehicle (not just the purchaser) and the goal of the pre-sale search was to protect the class of potential occupants, not just potential purchasers.

6. Whether the trial court improperly stated the rule of law in a published opinion when refusing to award non-economic damages on the contention that plaintiff did not provide evidence of "reasonable compensation" for his emotional distress and did not establish the right to a specific award of monetary compensation for emotional distress injuries

The unique set of circumstances involved in this case creates precisely the type of situation wherein emotional distress damages can be said to be a "natural result of the breach, or those that are a consequence of special or unusual circumstances which were in the reasonable contemplation of the parties when making the contract" [Restatement (Second) Section 351; Hadley v Baxendale 156 Eng. Rep. 145 (Ex. 1854)]

Under the circumstances and context of this sale (which occurred close to the USA/Mexico border crossing at San Ysidro, CA), a breach of the implied obligation to remove large loads of concealed narcotics before releasing the vehicle to AGREDANO was foreseeable to result in imprisonment in Mexico.

Being arrested and imprisoned as a result of the USA's breach of the implied obligation to remove large loads of marijuana from the Pathfinder before selling it to AGREDANO had the "biggest probability of resulting" in "emotional disturbance" should the breach result in the most obviously foreseeable harm – imprisonment. The object of this implied contractual term (removal of the marijuana prior to sale) was to protect the AGREDANO from arrest and was clearly designed to protect his "dignity, mental concern or solicitude (and) sensibilities" [Crisci v Sec Ins. Co of New Haven 426 P.2d 173 (Cal. 1967)]

In the AGREDANO case, the breach of the implied obligation to conduct an adequate search resulted in arrest and imprisonment. The foreseeable damage sustained as a result of imprisonment was loss of liberty – a subject matter "which so affect(s) the vital concerns of the individual that severe mental distress is a foreseeable result of breach. For many years, our courts have recognized that damages for mental distress may be recovered for breach of a contract of this nature" [Kwan v Mercedes, 23 Cal.App.4th, 174, 188 (1994) citing Wynn v Monterey Club, 111 Cal.App.3d 789 (1980) wherein a husband was allowed to recover emotional distress damages for breach of a contract with a gambling club to bar his wife from entering and from cashing her checks]

The trial court improperly applied the law in a published decision by stating that the court would not award emotional distress damages because the plaintiff did not introduce

evidence of "reasonable compensation" for his emotional distress. [AGREDANO, Id., 82 Fed.Cl. 416 at 451-452 (2008)] This part of the trial court's published ruling was not addressed in the judgment issued by the Court of Appeals. It is also an improper statement of the law.

"Pain and suffering, by definition, is an abstract concept. It is not readily calculable through a convenient mathematical formula, evidence of its precise monetary equivalent cannot be definitively presented as if it was past medical expenses or wages lost due to an injury. Indeed, the jury is only instructed to award a "reasonable" amount, that a definite standard or method of calculation does not exist, and argument urging a particular calculation or amount must not be considered evidence." [Garfoot v Avila (1989) 213 Cal.App.3d 1205, 1212;Beagle v Vasold (1966) 65 Cal.2d 166, 181 citing, 7 Wigmore, Evidence (3d ed. 1940) Section 1944, pp. 55-56; McCormick on Damages, Section 88, pp. 318-319]

"Our present system of requiring the jury to determine, without the benefit of a mathematical formula, the amount of a general damages award is not without its faults. But ..... a plaintiff may not supply, through expert testimony or otherwise, her own formula for computing such damages. .... no expert may supply a formula for computing the value of life and, by extrapolation, the value of the loss of enjoyment of life. That calculation, at present, must be left to the sound discretion of the jury." [Loth v Truck-A-Way Corp. (1998) 60 Cal. App. 4th

757, 768 citing Mercado v Ahmed (7th Cir. 1992) 974 F2d 863, 868-871].

Further, in cases where the evidence and the law establishes that the plaintiff is entitled to an award of emotional distress damages, the trier of fact cannot render an award that fails to include any compensation whatsoever for emotional distress damages. Such an award would be inadequate as a matter of law. In the case of Dodson v J. Pacific, Inc. (2007) 154 Cal.App.4th 931, 937, the California Court of Appeal (Second District) found that appellate cases finding an award inadequate for failure to account for pain and suffering involved situations where the right to recover was established and there was also proof that the medical expenses were incurred. [Id., at 937]. "While the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." [Id., at 938]

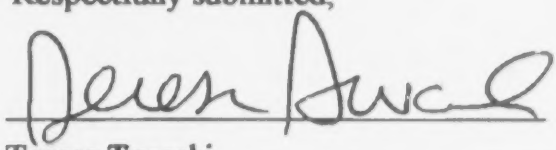
To the extent that the JUDGMENT was based upon the finding that AGREDANO failed to produce evidence of the specific amount of monetary compensation that would be "reasonable compensation" for his serious emotional disturbance, AGREDANO contends that the conclusions of law are in error as evidence of "reasonable compensation" is not required to establish the right to a specific award of monetary compensation for emotional distress injuries. [Loth v Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 760; Mercado v Ahmed (7th Cir. 1992) 974 F2d 863, 868-871]

AGREDANO contends that prison conditions that AGREDANO had to endure and the medical bills he incurred when viewed in light of the length of time he was imprisoned [351 days, from January 24, 2002 to January 10, 2003], resulted in "serious emotional disturbance" that was specifically foreseen by the USA at the time that the contract was entitled into and, as such, the unique situation of this particular case should result in a finding that AGREDANO's emotional distress damages are recoverable in this action.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted and the Court of Appeals reversed.

July 13, 2010 Respectfully submitted,



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